

Public Records Law Changes

What Municipal Officials Need to Know

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New Public Records Law

- Chapter 121, Acts of 2016, An Act to Improve Public Records (the “Public Records Act”), was enacted by the Massachusetts Legislature and signed into law by Governor Baker on June 3, 2016.
- Most of its provisions become effective on January 1, 2017.

What Changed? (Part 1)

- There is new section 6A into Mass. Gen. L. c. 66 (the Public Records Law) that requires for the first time that each municipality designate one or more Records Access Officers (RAOs) to assist records requestors, to coordinate responses to requests and to prepare guidelines for access to public records held by the municipality.
- There is a new section 10 which governs the inspection and production of public records has been rewritten to require a response and/or production of public records within 10 days of receipt, identify the lawful basis for refusing or conditioning production, authorize a petition to the Supervisor of Public Records for unduly large, difficult or burdensome requests

What Changed? (Part 2)

- There is a new section 10A providing for new enforcement, remedies and fees, including the right to petition the Supervisor to determine whether there is a violation of the Public Records Laws, authorizes a referral of a violation to the Attorney General's Office, and allows for the filing of a lawsuit in the Superior Court by the requestor which may include reasonable attorneys fees and punitive damages
- There are new sections 19 and 20 which require towns to design or acquire an electronic record keeping system or databases that are capable of providing data in a commonly available electronic, machine readable format and permit the segregation and retrieval of public records and redacting of exempt information in order to provide maximum public access, require certain information to be publicly available,

What Every Employee Needs to Know

- You will be likely called on by Records Access Officers to assist with identifying and responding to Public Records Requests
- Records Access Officers are performing a public service and a statutory duty that has strict deadlines and significant consequences for non-cooperation to the town.
- Refer any verbal or written requests to Records Access Officers or Town Counsel immediately
- Every record that is made or received by a government entity or employee is presumed to be a public record unless a specific statutory exemption permits or requires it to be withheld in whole or in part.
- Records include all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any Massachusetts governmental entity

Exemptions to Public Records Laws

- Records that are exempt by law or by necessary implication. Mass. Gen. L. c. 4, § 7(26)(a).
- Records related solely to internal personnel rules and practices of the government unit. Mass. Gen. L. c. 4, § 7(26)(b).
- Personnel and medical files or information the disclosure of which may constitute an unwarranted invasion of personal privacy. Mass. Gen. L. c. 4, § 7(26)(c).
- Inter-agency or intra-agency memoranda or letters relating to policy positions being developed by the agency (matters of legal or policy while being developed) Mass. Gen. L. c. 4, § 7(26)(d).
- Notebooks and other materials prepared by an employee of the commonwealth which are personal to him and not maintained as part of the files of the governmental unit. Mass. Gen. L. c. 4, § 7(26)(d).

Exemptions to Public Records Law

- Investigatory materials necessarily compiled out of the public view by law enforcement or other investigatory officials. Mass. Gen. L. c. 4, § 7(26)(f).
- Trade secrets or commercial or financial information voluntarily provided to an agency for use in developing governmental policy and upon a promise of confidentiality. Mass. Gen. L. c. 4, § 7(26)(g).
- Proposals and bids to enter into any contract or agreement until bid deadlines and inter-agency or intra-agency communications made in connection with an evaluation process. Mass. Gen. L. c. 4, § 7(26)(h).
- Real estate appraisals of real property acquired or to be acquired. Mass. Gen. L. c. 4, § 7(26)(i).
- The names and addresses of any persons contained in, or referred to in, any applications for any licenses to carry or possess firearms and law enforcement personnel. Mass. Gen. L. c. 4, § 7(26)(j); Mass. Gen. L. c. 66 §10B
- Questions and answers, scoring keys and sheets and other materials used to develop, administer or score a test, examination or assessment. Mass. Gen. L. c. 4, § 7(26)(l).
- Records describing security plans, blueprints, etc. Mass. Gen. L. c. 4, § 7(26)(n).
- Attorney-client privileged information.

Records Access Officers

- Every town must have at least 1 designation RAO
- Town Clerk is the default RAO but Selectmen/Town Manager/Administrator may appoint others
- Have specific statutory duties set forth in section 6A including the publication of guidelines that enable a person seeking access to public records in the custody of the agency or municipality
- Name, title, business address, business telephone number, and business email address of each RAO must be posted in town offices and on website
- RAO shall, to the extent feasible, provide the public record in the requestor's preferred format or, in the absence of a preferred format, in a searchable, machine readable format.
- RAO shall maintain and file a log for annual reporting purposes of each request for public records

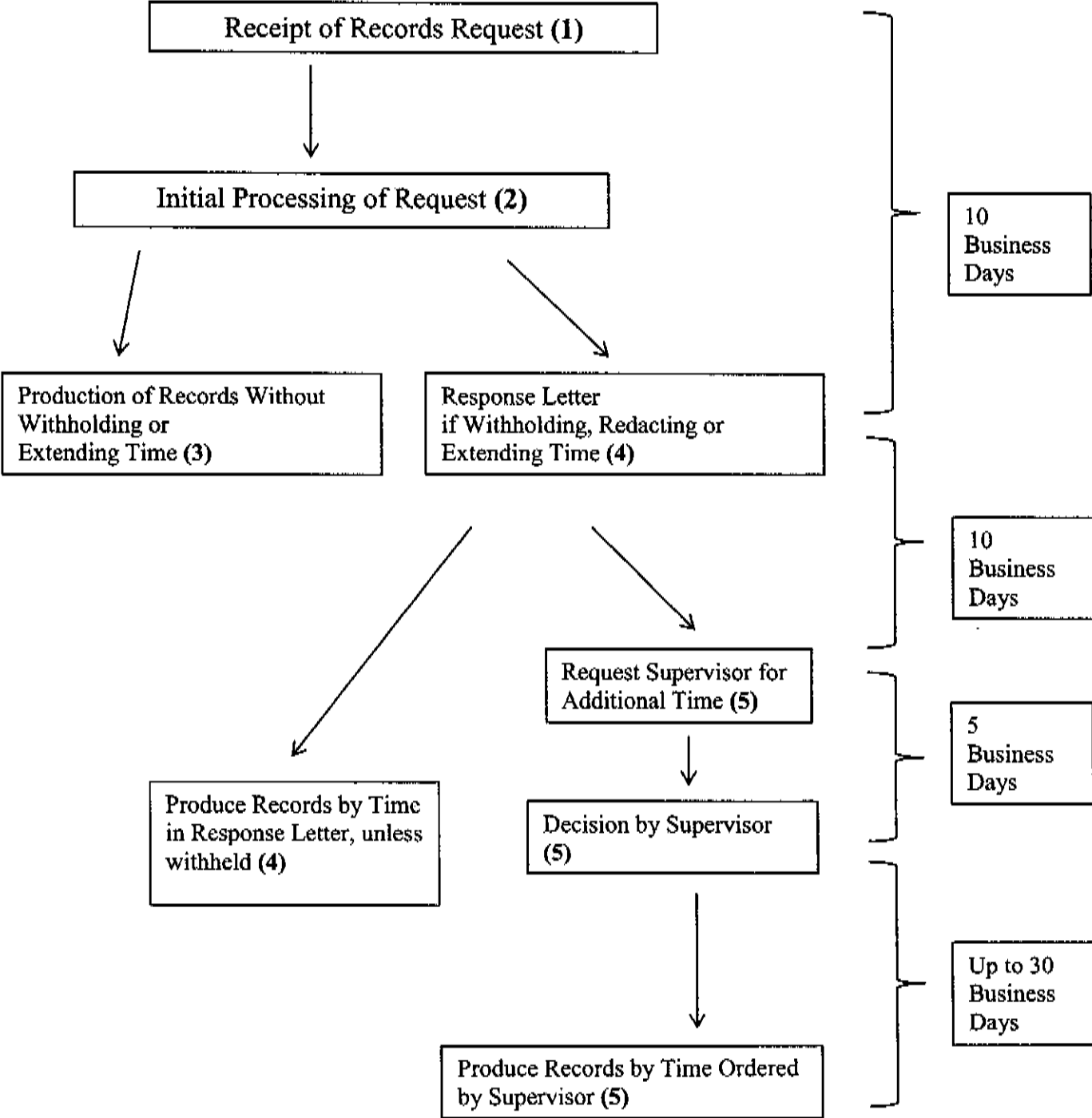
Request and Responses

- The RAO must permit inspection or provide a copy of a public record within 10 business days from the date the request was made, provided that the RAO receives payment of a reasonable fee, the public record is within the RAO's possession and the request reasonably describes the record sought.
- Where the Public Entity does not intend to produce the record, there must be a response within 10 days in compliance with §10
- Time frame to comply cannot exceed 25 business days in the case of a municipality, unless the requestor agrees to extending such time frames voluntarily.

Fees

- A RAO may assess a “reasonable fee” for producing a public record unless the record requested is freely available to the public
- RAO may charge the actual cost of a storage device or materials as part of the fee and not more than 5¢ per page for black and white paper copies or printouts.
- The Act exempts the first two hours of municipal employee time, from reimbursement, excepting in towns at or less than pop. 20,000 and caps the hourly rate thereafter at \$25. In either case, the full amount of employee time is reimbursable if such time is spent redacting or segregating records if required (not permitted) by law and if approved by the Supervisor. Employee time includes the use of vendors, including outside legal counsel.

Flow Chart of Procedures Under Public Records Law



**STANDARDIZED RESPONSE PROCEDURE
TO PUBLIC RECORDS REQUEST**

I. UPON RECEIPT OF PUBLIC RECORDS REQUEST

A. Immediately upon receipt:

- i. Verify request received by hand, by mail or email in writing.
- ii. Review request to see if records “reasonably described”; RAO can request clarification from requestor.
- iii. Determine response date or production date (10 business days) and diary date for response or production.

B. Within 10 Business days but Prior to 10th Business day:

- i. Determine if records exist in possession, custody or control.
- ii. Ensure request is provided to correct department RAO and transmit to correct.
- iii. Send request to officials, Employees, Board members who may have custody of records
- iv. If records exist, determine how long to search, compile and reproduce. Town RAOs have an additional 15 days to produce.
- v. If size, complexity or multiple requests or requests are unduly burdensome, evaluate request and determine fee and provide fee to be assessed to requestor in writing.
- vi. If records are available as electronic records, records should be provided in electronic format that is requested or in standard searchable format unless requestor is unable to receive electronically.
- vii. Draft and send response letter if will take more than 10 days to produce records, records will be withheld or redacted.

II. PRODUCTION OF RECORDS

- A. If no additional time needed, no withholding or redacting, produce records. If records available electronically, provide access information.
- B. Collect fee prior to providing records
- C. Make records available for inspection, pickup or delivery in the format requested by requestor.
- D. Document date requested information provided, number of hours to comply, and fees if any charged.

III. OPTIONS FOR ADDITIONAL TIME

- A. When additional time needed:
 - i. Send letter to requestor within 10 business days:
 - a. confirming receipt;
 - b. identify any records not in possession, custody or control;
 - c. identify any other agency in possession of records, if known;
 - d. identify records intended to be withheld and reasons and specified exemptions for non-disclosure.
 - e. identify what is produced and basis for request for additional time (size, complexity, undue burdensome)
 - f. identify a reasonable time to produce (not longer than 25 days or agreed later date if agreed with requestor)
 - g. suggest a modification of request
 - h. provide a good faith estimate of fees
 - i. include a statement of requestors' rights to appeal to Supervisor or Superior Court

NB: Letter to be reviewed by counsel.

IV. APPEAL BY RAO TO SUPERVISOR FOR MORE TIME

- A. if more than 25 days needed to respond, RAO must determine within 20 days.

- B. RAO drafts and submits Petition to Supervisor of Records not later than 20 days after date of receipt of PRR (with counsel)
- C. RAO provides Petition to requestor
- D. Supervisor determines within 5 days
- E. Records to be produced in accordance with decision.

V. FEES

A. Permissible Fees:

- i. Cost of Storage Device
- ii. \$.05 per page (B&W materials)
- iii. Hourly rate of lowest paid employee with skills to compile, segregate, redact and reproduce not to exceed \$25/hr without Supervisor permission.
- iv. Employee time may include vendor time.

B. Costs that May Not be Included:

- i. If population is >20,000 the first 2 hours are free of charge for hourly time
- ii. Staff time for segregation and redaction unless approved by Supervisor of Records

C. Petitions to Supervisor of Records for Fee Adjustments

- i. Hourly rates in excess of \$25.00/hr
- ii. Time spent for segregation and redaction when not required by law

Adjustments may be granted for commercial requests, fee represents good faith cost of compliance and request can't be completed without redaction or increase in fee)

- D. Waivers of Fees if disclosure is in public interest, noncommercial or financial hardship is shown.
- F. Forfeit right to fees if no response within 10 business days or requestor gets relief in court.
- G. Right to deny fees if prior balance due.

HIGHLIGHTS OF DRAFT REGULATIONS

1. **Provides some basic Definitions:**

Defines Business Day to exclude weekdays when town custodian's office is closed unexpectedly like for a snow day, etc.

Defines what is a request for a Commercial Purpose to include resale of portion of public record or records advance the requestor's strategic business interests.

2. **Specifies where communications with the Supervisor should be sent:**

Supervisor of Public Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719
Boston, MA 02108
pre@sec.state.ma.us

3. **Clarifies and expands duties of Records Access Officers (RAOs)**

Requires RAOs to post commonly available records on Town website

Requires RAOs to prepare and post on the website Guidelines for persons seeking public access.

Requires Towns to move towards maintaining records online and in searchable format

4. **Specifies Procedures for Responses, Production and Appeals.**

32.01: Authority

32.02: Title, Scope and Purpose

32.03: Definitions

32.04: General Provisions

32.05: Records Access Officers

32.06: Additional Records Access Officer Responsibilities

32.07: Rights of Access

32.08: Copies of records; fees

32.09: Appeals

32.10: Enforcement of Orders

32.11: Advisory Opinions

32.01: Authority

950 CMR 32.00 is issued by the Supervisor of Public Records under the authority of G. L. c. 66, § 1.

32.02: Title, Scope and Purpose

- (1) 950 CMR 32.00 shall be referred to as the Public Records Access Regulations.
- (2) 950 CMR 32.00 describes the practices and procedures of the Division of Public Records relative to the requirements of governmental entities or political subdivisions of the Commonwealth with respect to disclosure of public records, reporting requirements for certain records access officers and ensuring that disputes regarding access to particular records are resolved expeditiously and fairly. 950 CMR 32.00 shall not limit the availability of other remedies provided by law.
- (3) The Division of Public Records is under the supervision of the Supervisor of Public Records. The Supervisor may amend and rescind such rules, forms and orders as are contemplated by the provisions of the Massachusetts General Laws and as are necessary to carry out their purposes.
- (4) From time to time, the Supervisor of Public Records may authorize exceptions to 950 CMR 32.00 with respect to any specific requirement provided that such exceptions to 950 CMR 32.00 are in conformity with the provisions of the Massachusetts General Laws.

32.03: Definitions

For the purposes of 950 CMR 32.00 unless the context otherwise requires, the following terms shall have the meanings indicated:

Advisory Opinion means an opinion issued by the Supervisor of Public Records intended to provide guidance on issues related to public records access and retention.

Agency means any governmental entity, other than a municipality, that is identified in G. L. c. 66, § 6A and G. L. c. 4, § 7, clause Twenty-sixth and makes or receives “public records,” as defined therein. It includes any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32.

Business Day means Monday through Friday. Business day does not include Saturdays, Sundays, legal holidays, or other weekdays where a custodian’s office is closed unexpectedly.

Commercial Purpose means the sale or resale of any portion of the public record or the use of information from the public record to advance the requester’s strategic business interests in a manner that the requester can reasonably expect to make a profit including in addition to the foregoing, obtaining names and addresses from the public record for the purpose of solicitation. It does not include gathering or reporting news or gathering information to promote citizen oversight or further the understanding of the operation or activities of government or for academic, scientific, journalistic, or public research or education.

Custodian means any governmental entity, including municipal government entities that makes or receives public records.

Division means Division of Public Records, Office of the Secretary of the Commonwealth of Massachusetts.

Governmental Entity means any authority established by the General Court to serve a public purpose, any department, office, commission, committee, council, board, division, bureau, or other agency within the Executive Branch of the Commonwealth, or within a political subdivision of the Commonwealth, including municipal government entities. It does not include the legislature, the judiciary, or the Governor.

Municipality means any municipal government entity, other than an agency, that is identified in G. L. c. 66, § 6A and G. L. c. 4, § 7, clause Twenty-sixth and makes or receives “public records,” as defined therein. A local housing, redevelopment or similar authority, regional district or other consolidation or combination of municipal entities shall be deemed a municipality. It includes any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision as defined in section 1 of chapter 32.

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Public Records means all books, papers, maps, photographs, recorded tapes, financial statements, statistical tabulations, or other documentary materials or data, regardless of physical form or characteristics, made or received by any officer or employee of any agency, executive office, department, board, commission, bureau, division or authority of the commonwealth, or of any political subdivision thereof, or of any authority established by the general court to serve a public purpose, or any person, corporation, association, partnership or other legal entity which receives or expends public funds for the payment or administration of pensions for any current or former employees of the commonwealth or any political subdivision unless such materials or data fall within one or more of the exemptions found within G. L. c. 4, § 7, clause Twenty-sixth.

Records Access Officer means a governmental officer or employee or a designee within an agency or municipality designated by an agency or municipality to perform duties described in 950 CMR 32 including coordinating a response to requests for access to public records, assisting individuals seeking public records in identifying the records requested, assisting the custodian in preserving and managing public records, and preparing guidelines that enable requestors to make informed requests.

Requester means any person or entity seeking to inspect or obtain copies of public records.

Redact means to delete, or otherwise expurgate that part of a public record that is exempt from disclosure under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege from non-exempt material.

Search Time means the time needed to locate, pull from the files, copy and reshelvc or refile a public record. However, it shall not include the time expended to create the original record.

Secretary means the Secretary of the Commonwealth of Massachusetts.

Segregation Time means the time used to review records to determine what portions are subject to redaction or withholding under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

Supervisor means Supervisor of Public Records or Supervisor of Records.

Withhold means to hold back from disclosure a record under G. L. c. 4, § 7, clause Twenty-sixth or the common law attorney-client privilege.

32.04: General Provisions

- (1) **Division Mailing Address and Electronic Mail Address.** All communications shall be addressed or delivered to:

Supervisor of Records
Division of Public Records
Office of the Secretary of the Commonwealth
One Ashburton Place, Room 1719

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Boston, Massachusetts 02108

or

pre@sec.state.ma.us

Electronic communication is strongly encouraged and is the preferred method of correspondence.

- (2) **Division Business Hours.** The regular hours of the Division are from 8:45 a.m. to 5:00 p.m. each business day.
- (3) **Computation of Time.**
 - (a) **Electronic Correspondence.** The computation of any time referred to in 950 CMR 32.00 for electronic correspondence shall begin with the first business day following the date of transmission.
 - (b) **Mail or In Person Delivered Correspondence.** The computation of time referred to in 950 CMR 32.00 for mail or in person delivered correspondence shall begin with the first business day following receipt of such document.
 - (c) When the last day of the period so computed is a day on which the offices of the Division are closed, the period shall run until the end of the next business day.
- (4) **Presumptions.** In all proceedings pursuant to 950 CMR 32.00, there shall be a presumption that the record sought is public.

32.05: Records Access Officers

- (1) Each agency and municipality shall designate one or more employees as records access officer(s).
- (2) In a municipality, the municipal clerk, or the clerk's designees, or any designee of a municipality that the chief executive officer of the municipality may appoint, shall serve as records access officers.
- (3) The designation of a records access officer shall not be construed to prohibit employees who have been previously authorized to make public records or information available to the public from continuing to do so. Any such employee shall be deemed to be a records access officer and subject to the obligations herein.
- (4) Each agency and municipality shall post in a conspicuous location at its offices and on its website, if any, the name, title, business address, business telephone number, and business email address of each records access officer.

- (5) A records access officer shall:
- (a) coordinate the custodian's response to requests for access to public records and shall facilitate the resolution of such requests by the timely and thorough production of public records;
 - (b) assist persons seeking public records to identify the records sought;
 - (c) assist the custodian in preserving public records in accordance with all applicable laws, rules, regulations and retention schedules as issued by the Supervisor;
 - (d) provide public records to a requester in electronic format unless electronic format is not available or the requester does not have the ability to receive or access the records in electronic format and if feasible, in the requesters preferred format. In the absence of a preferred format, the records shall be provided in a searchable machine-readable form;
 - (e) furnish the public records by providing reasonable assistance in locating the records on an appropriately indexed and searchable public website;
 - (f) prepare guidelines to be posted on the website of the agency or municipality that enable the person seeking access to public records in the custody of the agency or municipality to make informed requests regarding the availability of such public records electronically or otherwise. The guidelines shall include a list of categories of public records maintained by the agency or municipality and such list shall be updated periodically;
 - (g) a municipal records access officer shall, to the extent feasible, post commonly available public record documents on a website maintained by the municipality for a period to be determined by each municipality. The retention period of records posted online shall be determined by the Municipal Records Retention Manual.

32.06: Additional Records Access Officer Responsibilities

- (1) **Agency Records Access Officers.** The requirements of 950 CMR 32.06(1) shall apply only to agency records access officers:
- (a) agency designation of primary and secondary records access officers; reporting requirements:
 - 1. each agency shall designate one primary records access officer responsible for reporting information to the Secretary pursuant to G. L. c. 66, §6A(e) and 950 CMR 32.06(1)(c).

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2. a primary records access officer shall submit a notification of such designation to the Division electronically in a manner determined by the Division.
 3. the primary records access officer may designate secondary record access officers to facilitate reporting such information.
 4. the primary records access officer shall electronically notify the Secretary of the designation of secondary records access officers electronically in a manner determined by the Division.
 5. the agency shall maintain and update information regarding primary and secondary records access officers electronically, including changes in personnel identified as primary and secondary records access officers, in a manner determined by the Division.
- (b) agency records access officers shall electronically report to the Secretary the information described in 950 CMR 32.06(1)(c)(1-9) in a manner determined by the Secretary.
- (c) an agency records access officer shall report to the Secretary with respect to requests and responses to requests for each calendar year ending December 31:
1. the nature of each request and the date on which each request was received;
 2. the date on which a response is provided to the requestor;
 3. the date on which a public record is provided to the requestor;
 4. the number of hours required to fulfill the request;
 5. fees charged to the requester, if any;
 6. records access officer petitions to the Supervisor submitted under G. L. c. 66, §10(d)(iv) and 950 CMR 32.07(4)(g);
 7. requests appealed to the Supervisor under G. L. c. 66, §10A and 950 CMR 32.09(1);
 8. the time required to comply with the Supervisor's orders under G. L. c. 66, §10A; and
 9. the final adjudication of any associated court proceedings under G. L. c. 66, §10A(d).

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- (d) exceptions to the reporting requirement related to requests for certain types of records shall be determined at the discretion of the Supervisor and may include:
1. certified copies of records;
 2. registry of deeds records;
 3. incorporation records;
 4. vital records.
- (e) all information must be provided in accordance with 950 CMR 32.06(1) by 5:00 p.m. on the last business day of the calendar year.
- (f) an agency records access officer shall provide on a searchable website electronic copies, accessible in a commonly available electronic format, of the following types of records, provided in a manner consistent with state and federal law:
1. final opinions, decisions, orders, or votes from agency proceedings;
 2. annual reports;
 3. notices of regulations proposed under G. L. c. 30A;
 4. notices of hearings;
 5. winning bids for public contracts;
 6. awards of federal, state and municipal government grants;
 7. minutes of open meetings;
 8. agency budgets; and
 9. any public record information of significant interest that the agency deems appropriate to post, such determination to be made by each agency on a case-by-case basis.
- (g) records access officers shall post records online pursuant to 950 CMR 32.06(1)(f) as soon as practicable
1. such posting shall remain online for a period to be determined by each agency;
 2. the retention period of records posted online shall be determined by the Statewide Records Retention Schedule.

32.07: Rights of Access

(1) Requests for Public Records.

- (a) requests for public records may be made orally in person or may be written. Telephone requests may be accepted at the discretion of the records access officer.
- (b) requests for public records shall include a reasonable description of the requested record to the records access officer so that he or she can identify and locate it promptly.
- (c) written requests may be delivered by a requester to the business address or designated website or email address of a records access officer or governmental entity custodian:
 - 1. by hand;
 - 2. by mail;
 - 3. by electronic mail; or
 - 4. by facsimile.
- (d) a records access officer shall not require a particular form be used by requesters, but may make forms available for requesters.
- (e) a person shall not be required to make a personal inspection of the record prior to receiving a copy of it.
- (f) calculation of time will toll only for requests that are made in accordance with 950 CMR 32.07(1).

(2) Records Access Officer Response to Requests for Records.

- (a) a records access officer shall permit all public records within his or her custody to be inspected or copied by any person during regular business hours and without unreasonable delay.
- (b) a record access officer's superior knowledge of the contents of a governmental entity's files shall be used to assist in promptly complying with the request.
- (c) a records access officer shall provide a written response to a request for public records no later than the tenth business day following the receipt of a request.

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- (d) a records access officer shall not assess a fee for the provision of public records if the records access officer's response is provided more than ten business days after the receipt of the request, subject to the provisions of 950 CMR 32.07(4).
 - (e) if a records access officer intends to provide records, access to such records must be provided no later than the tenth business day following the receipt of a request, unless an extension of time is permitted in a manner consistent with 950 CMR 32.07(4).
 - (f) a written request for records will be deemed received on the first business day following electronic transmission or physical receipt by the records access officer; an oral request will be deemed received on the day it was made.
 - (g) a records access officer may delay provision of records until all fees related to such requests are paid in full by the person seeking access to the requested records in accordance with 950 CMR 32.08.
 - (h) a records access officer shall, when appropriate, suggest a reasonable modification of the scope of the request or offer to assist the requestor to modify the scope of the request if doing so would enable the agency or municipality to produce records sought more efficiently and affordably.
 - (i) a records access officer may not require the requester to specify the purpose for a request except:
 - 1. when the requested records concern information which may be exempt from disclosure pursuant to G. L. c. 4, § 7(26)(n);
 - 2. to determine whether the records are requested for a commercial purpose; or
 - 3. to determine whether to grant a request for a fee waiver.
 - (j) A records access officer shall identify a reasonable timeframe in which it shall produce the public records sought in the following manner:
 - 1. **Agencies.** For an agency, the timeframe shall not exceed 15 business days following the initial receipt of the request for public records;
 - 2. **Municipalities.** For a municipality the timeframe shall not exceed 25 business days following the initial receipt of the request for public records.
- (3) **Denial by Records Access Officer.**

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- (a) the records access officer shall use superior knowledge of the records to determine whether any responsive records may be provided due to the status of a requester, or a representative of the requester.
 - (b) a records access officer shall provide written notice by first class mail or electronic mail to a requester of any denial of access to records.
 - (c) a records access officer shall provide such written notice of denial of access within ten business days of its receipt of a request for public records.
 - (d) such written notice of denial shall include:
 - 1. the date of the request;
 - 2. identification of any records sought that are not within the possession, custody, or control of the records access officer;
 - 3. identification of any known records access officer that may be in possession, custody or control of the public record sought;
 - 4. identification of any records, categories of records or portions of records that the records access officer intends to withhold;
 - 5. identification of any specific exemption to the Public Records Law or common law privilege that applies to the withhold record or records;
 - 6. identification of the applicability of each cited exemption or privilege to each portion of the withheld record or records;
 - 7. identification of any portions of responsive records that the records access intends to produce; and
 - 8. a statement informing the requestor of the right of administrative appeal to the Supervisor under 950 CMR 32.09(1) and the right to seek judicial review of an unfavorable decision by commencing a civil action in the superior court.
 - (e) where a record has been withheld based on a claim of the attorney-client privilege the records access officer shall provide in its written denial a detailed description of the record, including the names of the author and recipients, the date, the substance of such record, and the grounds upon which the attorney-client privilege is being claimed.
- (4) **Petition for modification or waiver by a records access officer to the Supervisor.**
- (a) all petitions for modification or waiver from a records access officer to the Supervisor shall be in writing and delivered to the Supervisor in accordance with

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950 CMR 32.04(1). A copy of the petition shall be provided by the records access officer to the requester. The Supervisor shall issue a written determination with findings regarding any such petition within five business days following receipt of a records access officer petition.

- (b) petitions filed under this section do not affect the requirement that a records access officer shall provide an initial response to a requester within ten business days after receipt of a request for public records, pursuant to 950 CMR 32.07(2)(c) and 950 CMR 32.07(3)(c). Failure to comply with this requirement will result in a waiver of the right to assess fees for public records.
- (c) all such petitions shall be considered public records both in the custody of the records access officer and the Supervisor.
- (d) petitions for modification or waiver may include a request for extension of time to furnish copies of the requested records, to waive statutory limits to fees, or to waive the obligation to provide records in response to a request that was frivolous.
- (e) such petitions must be made by a records access officer within 20 business days after receipt of a request for public records, or within ten business days after the records access officer's receipt of a determination by the Supervisor that a requested record constitutes a public record.
- (f) a petition for extension of time shall include a brief narrative detailing why an extension of time is necessary.
- (g) request for a waiver of statutory limits to fees assessed to segregate and/or redact public records:
 - 1. any records access officer may petition the Supervisor to charge for time spent segregating or redacting records.
 - 2. only a municipal records access officer may petition the Supervisor with respect to the maximum hourly rate of \$25 per hour for time required to comply with a request.
 - 3. records access officers shall not petition the Supervisor seeking a waiver associated with the provisions of 950 CMR 32.08(2)(m)(1), (n)(1).
 - 4. a records access officer shall respond to a request within five business days of receipt of the Supervisor's determination regarding a petition submitted under section 950 CMR 32.07(4)(g).
 - 5. failure by the records access officer to comply with the provisions of this section shall result in a waiver of the right to assess a fee pursuant to 950 CMR 32.07(2)(d).

32.08: Copies of records; fees

(1) Copies of paper and electronic records.

- (a) upon request, a person shall be entitled to receive in hand, by mail, by facsimile or electronically one copy of a public record or any desired portion of a public record.
- (b) as an alternative to obtaining copies of records from a records access officer a person shall be permitted to, to the extent feasible:
 - 1. view and inspect records prior to obtaining copies; or
 - 2. use a personal device such as a camera or portable scanner to copy records.
- (c) the records access officer shall presume that a requester prefers copies provided in machine-readable electronic form unless such form is unavailable.
- (d) the records access officer shall not convert a record from one electronic form to another as a means to deny access to portions of the record such as mathematical formulas in spreadsheet records or metadata contained in email records.
- (e) the records access officer shall ensure, to the extent feasible that:
 - 1. newly acquired or implemented electronic record keeping systems or databases are capable of providing data in a commonly available electronic, machine readable format; and
 - 2. the system allows for information storage and retrieval methods permitting retrieval of public portions of records to provide maximum public access.
- (f) a responsive record in the form of an extract of existing data shall not be considered creation of a new record and shall be considered a record in existence at the time of the request.

(2) Fees.

- (a) a records access officer may assess a reasonable fee for the production of a public record except those records that are freely available for public inspection.
- (b) a records access officer may assess a reasonable fee to provide copies of public records.
- (c) a records access officer shall provide a written, good faith estimate of the applicable fees to be incurred prior to complying with a public records request.

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- (d) the reasonable fee shall not exceed the actual cost of reproducing the record.
- (e) a fee shall not be assessed for time spent segregating or redacting records unless such segregation or redaction is required by law or approved by the Supervisor.
- (f) the charge for black and white paper copies or printouts of records of any size susceptible to the ordinary means of production shall not exceed 5 cents per page, for both single and double-sided copies.
- (g) a records access officer shall not assess a copying fee for electronic copies or facsimile copies of public records.
- (h) the actual cost of any storage device or material provided to a person in response to a request for public records may be included as part of the fee.
- (i) for copies of public records not susceptible to ordinary means of reproduction, the actual cost incurred in providing a copy may be assessed.
- (j) a records access officer shall assess the lowest hourly rate of a person capable of compiling, segregating, redacting and reproducing a requested record, subject to the requirements of 950 CMR 32.08.
- (k) a records access officer may assess the actual cost of postage to mail copies of public records, provided:
 - 1. the requester specifically requests that records be mailed or is unable to receive copies in person; and
 - 2. the records access officer shall charge the lowest cost available for such mailings, at the discretion of the requester.
- (l) **Waiver of fees.** Records access officers may waive or reduce the amount of any assessed fee upon a showing that:
 - 1. disclosure of a requested record is in the public interest;
 - 2. the request for records is not primarily in the commercial interest of the requestor; or
 - 3. the requestor lacks the financial ability to pay the full amount of the reasonable fee.
- (m) **Agency records access officers.**
 - 1. an agency records access officer shall not assess a fee for the first four hours of time spent compiling, segregating, redacting and reproducing a requested record.

2. an agency records access officer shall not assess a fee for time spent compiling, segregating, redacting and reproducing a requested record unless such compilation, segregation or redaction is required by law or approved by the Supervisor.
3. an agency records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records.

(n) Municipal records access officers.

1. a municipal records access officer shall not assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record in a municipality with a population of over 20,000.
2. a municipal records access officer in a municipality with a population of 20,000 persons or fewer may assess a fee for the first two hours of time spent compiling, segregating, redacting and reproducing a requested record, provided:
 - i. population data shall be determined by the decennial U.S. Census or an annual census if contrary to the decennial U.S. Census; and
 - ii. it shall be the burden of the municipal records access officer to provide population data information in responses in which it seeks to assess such fees.
3. a municipal records access officer shall assess no fee of more than \$25 per hour for the cost to comply with a request for public records unless approved by the Supervisor, pursuant to 950 CMR 32.07(4).

(o) Failure to pay fee.

1. a records access officer may provide written notice denying access to public records to a requester who has failed to compensate the records access officer for previously produced public records for which it prepared a fee estimate, provided:
 - i. the prior fee estimate was prepared in compliance with 950 CMR 32.08; and
 - ii. the written notice cites the reasons for denial, including an itemized list of any balances attributed to previously produced records.

32.09: Appeals

(1) Appeal to the Supervisor.

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- (a) this section shall not apply to records in which the requester, or a representative of the requester, has a unique right of access to the record.
- (b) a requester may petition the Supervisor for failure by a records access officer to comply with a requirement of 950 CMR 32.00.
- (c) the Supervisor shall only open appeals associated with requests made in writing. An oral request, while valid as a public record request, shall not be the basis of an appeal under 950 CMR 32.09.
- (d) petitions for appeal of a response by a records access officer must be made within 90 calendar days of a response by a records access officer.
- (e) petitions for appeal of a failure to respond within the timeliness requirements of 950 CMR 32.00 must be made within 90 calendar days of the request.
- (f) all petitions for appeal shall be in writing and shall specifically describe the nature of the requester's objections to the response or failure to timely respond.
- (g) requesters shall provide to the Supervisor complete copies of all correspondence associated with the petition, including:
 - 1. a complete copy of the letter by which the request was made, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses; and
 - 2. a complete copy of all written responses associated with requests subject to the petition for appeal, including in the case of electronic communications all header information indicating time, date, subject, sender and recipient email addresses.
- (h) in petitioning the Supervisor, the requester shall provide a copy of such petition to the records access officer associated with such petition.
- (i) if the requester's petition for appeal is related to a previous appeal to the Supervisor, the requester's petition shall refer to the previous appeal number.
- (j) it shall be within the discretion of the Supervisor whether to open an appeal concerning a request for public records. The Supervisor may decline to accept an appeal for, among other reasons if, in the opinion of the Supervisor:
 - 1. the public records in question are the subjects of disputes in active litigation, administrative hearings or mediation;
 - 2. the request is designed or intended to harass, intimidate, or assist in the commission of a crime;

3. the public records request is made solely for a commercial purpose;
4. the requester has failed to comply with the provisions of this section.

(2) **Dispositions of Appeals.**

- (a) once reviewed and approved the Supervisor shall issue an appeal number associated with each appeal submitted by a requester.
- (b) The appeal will be considered received by the Supervisor once an appeal number is assigned.
- (c) the Supervisor shall issue a written determination regarding any petition submitted in accordance with 950 CMR 32.09(1) not later than ten business days following the date an appeal number is assigned.
- (d) upon a determination by the Supervisor that a violation has occurred, the Supervisor shall order timely and appropriate relief.

(3) **Hearings and conferences.**

- (a) the Supervisor may conduct a hearing pursuant to the provisions of 801 CMR 1.00. The decision to hold a hearing shall be solely in the discretion of the Supervisor.
 1. said rules shall govern the conduct and procedure of all hearings conducted pursuant to 950 CMR 32.09.
 2. nothing in 950 CMR 32.09 shall limit the Supervisor from employing any administrative means available to resolve summarily any appeal arising under 950 CMR 32.00.
- (b) the Supervisor may order conferences for the purpose of clarifying and simplifying issues and otherwise facilitating or expediting the investigation or proceeding. The decision to hold a conference shall be solely in the discretion of the Supervisor.

(4) **In Camera Inspections and Submissions of Data.**

- (a) the Supervisor may require an inspection of the requested record(s) in camera during any investigation or any proceeding initiated pursuant to 950 CMR 32.09.
- (b) the Supervisor may require the records access officer to produce other records and information necessary to reach a determination pursuant to 950 CMR 32.09.
- (c) the Supervisor does not maintain custody of documents received from a records access officer submitted for an in camera review. The documents submitted for an

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in camera review do not fall within the definition of public records. G. L. c, 4, § 7 (26).

- (d) upon a determination of the public record status of the documents, they are promptly returned to the custodian, and no copies shall be retained by the Supervisor.
- (e) any public record request made to the Division for records being reviewed in camera would necessarily be denied, as the office would not be the custodian of those records.
- (f) attorney-client privileged records voluntarily submitted to Supervisor:
 - 1. a records access officer may permissibly submit documents to the Supervisor for in camera review;
 - 2. such submission shall not waive any legally applicable privileges claimed by the records access officer.

(5) **Custodial Indexing of Records.**

- (a) the Supervisor may require a records access officer or governmental entity custodian to compile an index of the requested records.
- (b) said index shall be a public record and shall meet the following requirements:
 - 1. the index shall be contained in one document, complete in itself;
 - 2. the index shall adequately describe each withheld record or redaction from a released record;
 - 3. the index must state the exemption or exemptions claimed for each withheld record or each redaction of a record; and
 - 4. the descriptions of the withheld material and the exemption or exemptions claimed for the withheld material must be sufficiently specific to permit the Supervisor to make a reasoned judgment as to whether the material is exempt.
- (c) nothing in 950 CMR 32.09 shall preclude the Supervisor from employing alternative or supplemental procedures to meet the particular circumstances of each appeal.

32.10: Enforcement of Orders

A records access officer shall promptly take such steps as may be necessary to comply with an order of the Supervisor. If a records access officer fails to comply with an order issued by the

Supervisor, the Supervisor, upon the Supervisor's initiative, may notify the Attorney General to ensure compliance.

32.11: Advisory Opinions

Advisory opinions will only be issued upon the Supervisor's initiative.

SESSION 2:

TIPS FOR COMPLYING WITH THE PUBLIC RECORDS LAW

BEST PRACTICES IN PREPARATION FOR COMPLIANCE WITH THE NEW PUBLIC RECORDS LAW

ROBERT RITCHIE
Retired General Counsel
Mass. Department of Agricultural Resources

1. Familiarity with the "New PRL" statute

- Chapter 121, Acts of 2016 - amends the Public Records Law
- General Laws - G.L. c. 66 - "Public Records" (Especially §§ 6, 10, & 10A)
- General Laws - G.L. c. 4, § 7, clause 26 - Definition of public record; exemptions
- Code of Massachusetts Regulations - 950 CMR 32 (in process of promulgation)
- MMLA Informational Materials

2. Familiarity with the Municipal Records Retention Schedule

- Secretary of State's links to the Public Records Law:
<http://www.sec.state.ma.us/pre/preidx.htm>
- Municipal Records Retention Schedule:
http://www.sec.state.ma.us/arc/arcpdf/MA_Municipal_Records_Retention_Manual.pdf

3. Communicating with the Supervisor of Public Records Office

- Kellie Sullivan (Admin. Assistant) - 617-727-2832
kellie.sullivan@sec.state.ma.us
- Stephen Shorey (Staff Attorney) - 617-878-3405
stephen.shorey@sec.state.ma.us - 617-727-2832
- Shawn Williams, Supervisor:
swilliams@sec.state.ma.us

4. Appoint Records Access Officer ASAP

- Use the time between now and January 1st for RAO to get up to speed

5. Documents - Made or Received: Be discriminating

- Be discriminating on what records to create or to require
- Some records are required by law; others serve administrative or operational purposes only, having greater latitude for retention and disposal

6. Public Records retained beyond applicable retention period: Be discriminating

- Records in existence
- Records in possession

7. Retention and Safeguarding of, and Access to, Documents with Personal Information

SESSION 2:

TIPS FOR COMPLYING WITH THE PUBLIC RECORDS LAW

- General duty to maintain public records securely
- G.L. c. 93H – Safeguarding of records containing personal information; security breaches; retention; limiting access
- G.L. c. 93I – Disposition and destruction of records containing personal information; chain of custody

8. Disposal of documents beyond applicable retention period

- Good inventory and auditing protocols
- Wise decisions on what to keep and what to dispose of
- Secure disposal of documents with personal information

9. Good or bad housekeeping – search and segregation time and expense (G.L. c. 66, § 11)

- Can't make requester pay for poor housekeeping
- Every optionally retained record increases the burden of responding to requests
- Records: retain what you must; retain what you wish; dispose of the rest
- Organized storage and inventory procedures

10. Be prepared to respond

- Use of checklists, response timelines, and charts
- Document everything thoroughly
- Track costs of production

11. Take advantage of available resources

- City or town attorney
- Secretary of State's website
- MMLA – Public Records Information
- Supervisor's on-site training and record-keeping assistance

12. PRL - Minimum Standards

- PRL sets minimum standards not best practices
- Consider what you must do, what you should do, and what you can do
- Prospective requests – sometimes very useful
- Collaborating effectively with requester to narrow and focus the request
- Take full advantage of publicly accessible on-line records

13. Tech Support

- Begin now to work with tech support staff to be ready
- Maximize the placement of records on-line

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